Talam Corp Bhd & Anor v Bangkok Bank Bhd & Anor

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO B-02(W)-1890–11 OF 2015
HAMID SULTAN, PRASAD ABRAHAM AND ASMABI MOHAMAD JJCA
22 AUGUST 2016

Banking — Banker and customer — Facilities — Property charged as security — Order for sale for charged property due to default of repayment — Auction — Borrower informed bank that it would enter settlement agreement to redeem charged land — Land sold off lower than bank's valuation — Lower surplus — Whether bank aware of settlement agreement — Whether bank acted in breach of its duty of care to act in good faith to take reasonable steps to obtain best possible price from auction of charged land — Whether court should invoke powers under s 69(4) and (5) of the Courts of Judicature Act 1964 to direct bank to release surplus sum

The respondent ('the bank') granted to Talam Leasing Sdn Bhd ('Talam'), now known as Keuro Leasing Sdn Bhd ('Keuro Leasing') banking facilities. The bank requested Keuro Leasing to furnish landed property as security for the said banking facilities. Continental Heights Development Sdn Bhd ('Continental Heights') executed a third party charge in favour of the bank over its land. The bank obtained an order for sale for the charged land upon default by Keuro Leasing. The auction date was set but Keuro Leasing informed the bank that Talam would be entering into a settlement agreement with Menteri Besar Selangor Incorporated ('MBI') involving the charged land. By the said settlement agreement, MBI was buying the land at the price of RM48.7m which was higher than the bank's valuation for redemption purposes. The bank was aware of this settlement agreement and Keuro Leasing wrote to the bank to withhold all legal action since MBI had agreed to redeem the charged land. The charged land was sold at RM15m. The surplus fetched from the bank's auction sale was RM9,033,653 and this surplus sum has still not been released to the chargor. The issues that arose in this appeal was whether the bank, when it proceeded to auction the charged land, was aware there was an alternative proposal to redeem the charged property at a higher price, which would have left a higher surplus to Continental Heights; whether the bank had acted in breach of its duty of care to act in good faith to take reasonable steps to obtain the best possible price from the auction of the charged land; whether the bank should have taken into account the equity of redemption in the charged land of Talam as a surplus would have been used to settle Talam's debt to the State Government of Selangor; and whether the court should invoke its powers under s 69(4) and (5) of the Courts of Judicature Act 1964, to direct the bank

to release the surplus sum of RM9m from the auction sale to Continental Heights.

Held, dismissing the appeal with costs:

(1) The bank could not be said to have ignored the settlement agreement as this was a judicial sale conducted by the court in accordance with the provisions of the National Land Code ('the NLC') and the fact the sale was proceeded with was a matter within the purview of the court. The bank could not by any stretch of the imagination be said to have breached its duty of care and good faith to the chargor. The best possible price was obtained and the chargor at the material time did not appeal against the determination of the reserve price. Whilst the settlement agreement might have aided Talam in its settlement of debts with the State Government of Selangor, it would not directly benefit the chargor. As the bank had complied with the relevant provisions of the National Land Code, a plea of breach of duty of care and good faith in not obtaining the best possible price could not be sustained against the bank (see paras 26–27).

(2) The conduct of the judicial sale was in the hands of the court as provided by the provisions of the NLC. Even if the bank had written to vacate the public auction, the auction could still have been proceeded with by the court. No duty of care could be imposed on the bank as the judicial sale was conducted by the court and not the bank as the rights that were being proceeded with were rights *in rem* (see para 29).

(3) Pursuant to the related provisions of the NLC, after a public auction and the payment of the proceeds of sale, the sum of RM9m should have been refunded to Continental Heights and the court had no hesitation to invoke its powers under s 69(4) and (5) of the Courts of Judicature Act 1964 to direct that the aforesaid sum be so refunded (see para 39).

[Bahasa Malaysia summary

Lebihan diambil daripada jualan lelong bank adalah RM9,033,653 dan jumlah lebihan ini masih belum dilepaskan kepada penggadai. Isu yang berbangkit dalam rayuan ini adalah sama ada bank, apabila ia meneruskan untuk melelong tanah gadaian, menyedari terdapat cadangan alternatif untuk menebus harta gadaian pada harga lebih tinggi, yang mana akan meninggalkan lebihan kepada Continental Heights; sama ada bank telah melanggar kewajipan berjaga-jaga untuk bertindak suci hati untuk mengambil langkah-langkah wajar untuk memperoleh harga terbaik daripada lelongan tanah gadaian; sama ada bank sepatutnya mengambil kira ekuiti penebusan dalam tanah gadaian Talam sebagai lebihan yang akan digunakan untuk menyelesaikan hutang Talam kepada Kerajaan Negeri Selangor; dan sama ada mahkamah sepatutnya menggunakan kuasanya di bawah s 69(4) dan (5) Akta

Kehakiman Mahkamah 1964, untuk mengarahkan bank untuk melepaskan lebihan berjumlah RM9 juta daripada jualan lelongan kepada Continental Heights. Responden ('bank') telah memberikan Talam Leasiang Sdn Bhd ('Talam'), sekarang dikenali sebagai Keuro Leasing Sdn Bhd ('Keuro Leasing') kemudahan perbankan. Bank meminta Keuro Leasing untuk memberikan hartanah sebagai jaminan untuk kemudahan perbankan tersebut. Continental Heights Development Sdn Bhd ('Continental Heights') telah melaksanakan gadaian pihak ketiga bagi pihak bank atas tanahnya. Bank telah memperoleh satu perintah jualan bagi tanah gadaian apabila keingkaran oleh Keuro Leasing. Tarikh lelongan telah ditetapkan tetapi Keuro Leasing memaklumkan kepada bank bahawa Talam akan memasuki dalam perjanjian penyelesaian dengan Perbadanan Menteri Besar Selangor ('MBI') yang melibatkan tanah gadaian. Melalui perjanjian tersebut. MBI telah membeli tanah tersebut pada harga RM48.7 juta yang mana lebih tinggi daripada penilaian untuk tujuan penebusan. Bank menyedari perjanjian penyelesaian dan Keuro Leasing menulis kepada bank untuk menahan kesemua tindakan undang-undang memandangkan MBI telah bersetuju untuk menebus tanah gadaian. Tanah gadaian telah dijual pada RM15 juta.

Diputuskan, menolak rayuan dengan kos:

(1) Bank tidak boleh dikatakan telah mengabaikan perjanjian penyelesaian kerana ini adalah jualan kehakiman yang dikendalikan oleh mahkamah menurut proviso Kanun Tanah Negara ('KTN') dan fakta bahawa jualan telah diteruskan adalah perkara dalam bidang kuasa mahkamah. Bank tidak boleh dalam apa-apa keadaan dikatakan telah melanggar kewajipan berjaga-jaga dan suci hati terhadap penggadai. Harga terbaik telah diperolehi dan penggadai pada masa material tidak merayu terhadap penentuan harga cadangan. Walaupun perjanjian penyelesaian itu mungkin telah membantu Talam penyelesaian hutang dengan Kerajaan Negeri Selangor, ia tidak akan secara langsung memberi manfaat kepada penggadai. Oleh kerana bank telah mematuhi proviso berkaitan dengan KTN, rayuan pelanggaran kwajipan berjaga-jaga dan suci hati dalam tidak memperolehi harga terbaik tidak boleh dikekalkan terhadap bank (lihat perenggan 26–27).

(2) Pengendalian jualan kehakiman adalah di tangan mahkamah seperti yang diperuntukkan oleh proviso KTN. Jika pun bank telah menetapkan untuk membatalkan lelongan awam, lelongan masih boleh diteruskan oleh mahkamah. Tiada kewajipan berjaga-jaga boleh dikenakan atas bank kerana jualan kehakiman telah dikendalikan oleh mahkamah dan bukan bank kerana hak yang diteruskan itu adalah hak *in rem* (lihat perenggan 29).

(3) Mengikut proviso KTN yang berkaitan, selepas lelongan awam dan pembayaran hasil jualan, jumlah RM9 juta sepatutnya dikembalikan

kepada Continental Heights dan mahkamah tidak teragak-agak untuk menggunakan kuasanya di bawah s 69(4) dan (5) Akta Mahkamah Kehakiman 1964 untuk mengarahkan jumlah yang tersebut di atas untuk dikembalikan (lihat perenggan 39).]

Notes

For cases on banker and customer in general, see 1(2) *Mallal's Digest* (5th Ed, 2015) paras 2435–2562.

Cases referred to

Cuckmere Brick Co Ltd v Mutual Finance Ltd [1971] Ch 949, CA (refd)
Dato' Tan Chin Woh v Dato' Yalumallai @ M Ramalingam s/o V Muthusamy [2016] 5 MLJ 590, FC (refd)
How Seen Ghee v Development Bank of Singapore Ltd [1994] 1 SLR 526, CA (refd)
Low Lee Lian v Ban Hin Lee Bank Bhd [1997] 1 MLJ 77, SC (refd)
Malayan United Finance Bhd v Tay Lay Soon [1991] 1 MLJ 504, SC (refd)
Pendlebury v The Colonial Mutual Life Assurance Society Limited [1912] 13 CLR 676, HC (refd)
Phileoallied Bank (M) Bhd v Bupinder Singh a/l Avatar Singh & Anor [2002] 2 MLJ 513; [2002] 2 CLJ 621, FC (refd)
Tse Kwong Lam v Wong Chit Sen [1983] 1 WLR 1349, PC (refd)

Legislation referred to

Courts of Judicature Act 1964 s 69(4), (5)
National Land Code ss 257, 257(d), 266

Appeal from: Civil Suit No 22–1245 of 2010 (High Court, Shah Alam)

Cyrus Das (Chin Tzi Song, K Chandrasekar, Emmy Hazwani Jamil with him) (Arifin & Partners) for the appellants.
Oommen Kurien (Ain Aissa bt Mohamad with him) (Zaid Ibrahim & Co) for the respondent.

Prasad Abraham JCA:

[1] We heard this appeal on 22 April 2016, when after hearing submissions of both parties, we reserved judgment to a date to be fixed. We now deliver our grounds of judgment.

BACKGROUND FACTS

[2] We will refer to parties in their original names referred to in the High Court. Bangkok Bank Bhd ('the bank') granted to a company known as Talam Leasing Sdn Bhd ('Talam'), now known as Keuro Leasing Sdn Bhd ('Keuro

Leasing') banking facilities on or around 30 September 1994. Talam was the guarantor for the said facilities which were originally for the amount of RM3m (see P8 Tab 1 core bundle of document ('CBD') Vol 3).

[3] In 2005, the bank requested Keuro Leasing to furnish landed property as security for the said banking facilities. Continental Heights Development Sdn Bhd ('Continental Heights') executed a third party charge in favour of the bank over its land held under HS(D) 2489 No PT 6252 Mukim Dengkil Daerah Sepang Negeri Selangor ('the charged land') (see P8 Tab 2 CBD Vol 3).

[4] On 20 January 2010, the bank obtained an order for sale for the charged land upon default by Keuro Leasing. The auction date was set for 8 April 2010 (P4 Tab 12 CBD Vol 1).

[5] On the 8 March 2010 Keuro Leasing informed the bank that Talam would be entering into a settlement agreement with Menteri Besar Selangor Incorporated ('MBI') involving the charged land. By the said settlement agreement, MBI was buying the land at the price of RM15 per sqft which was higher than the bank's valuation for redemption purposes. This placed the value of the charged land at RM48,697,707 ('RM48.7m') (see P13 Tab 6 CBD Vol 3).

[6] On 12 March 2010, Talam entered into the 'settlement agreement' with MBI ('settlement agreement') and announced the same to Bursa Malaysia (see P15 Tab 7 CBD Vol 3).

[7] On the 15 March 2010, Keuro Leasing wrote to the bank to notify that Talam had entered into the 'settlement agreement'.

[8] By the 16 March 2010, the bank was aware of this settlement agreement (Tab 1 CBD Vol 2).

[9] On 22 March 2010, Keuro Leasing wrote to the bank to withhold all legal action since MBI had agreed to redeem the charged land (see p 18 Tab 9 CBD Vol 3).

[10] On 22 March 2010, MBI scheduled a meeting with the bank amongst others to request for the redemption statement (see p 20 Tab 10 CBD Vol 3).

[11] Continental Heights' ('chargor') solicitors wrote on 23 March 2010 to the bank solicitors requesting for the issuance of a redemption statement and the public auction fixed on 8 April 2010 be postponed (see p 19 Tab 11 CBD Vol 3).

[12] The auction date of the charged land fixed on 8 April 2010 was adjourned to 7 September 2010 (see D87 Tab 15 CBD Vol 3). **A**

[13] A redemption statement dated 6 April 2010 was issued by the bank to MBI expiring 30 June 2010 (see p 23 Tab 16 CBD Vol 13). (See also p 24 Tab 17 CBD Vol 3.) **B**

[14] A further redemption statement was sought for by the solicitor for the chargor (see pp 27–28 Tab 18 and 19 CBD Vol 3, p 29 Tab 20 CBD Vol 3 see also pp 30–31 CBD Vol 3). **C**

[15] The said charged property was sold at RM15m (p 33 Tab 24 CBD Vol 3).

[16] The surplus fetched from the bank's auction sale was RM9,033,653 and this surplus sum has still not been released to the chargor. **D**

THE ISSUES FOR THIS APPEAL

[17] Whether the bank when it proceeded to auction the charged land, was aware there was an alternative proposal to redeem the charged property at a higher price, which would have left a higher surplus to Continental Heights. **E**

[18] Whether the bank had acted in breach of its duty of care to act in good faith to take reasonable steps to obtain the best possible price from the auction of the charged land. **F**

[19] Whether the bank should have taken into account the equity of redemption in the charged land of Talam as a surplus would have been used to settle Talam's debt to the State Government of Selangor. **G**

[20] Whether this court should invoke its powers under s 69(4) and (5) of the Courts of Judicature Act 1964, to direct the bank to release the surplus sum of RM9m from the auction sale to Continental Heights. **H**

THE RELEVANT STATUTORY PROVISIONS OF NATIONAL LAND CODE

[21] It is our view that to appreciate the context of the arguments that are being canvassed in this appeal, the statutory regime of charges and its creation must be set out. **I**

[22] Under the National Land Code, Continental Heights and the charged

property was used to create a charge in favour of Keuro Leasing a third party ('third party charge'). The right to redeem the charged property is by redemption of the loan due and a registration of the discharge of charge. The chargor has the right to tender payment until the charged property is sold (see s 266 of the National Land Code).

[23] Once the chargor is in default, the bank would proceed to obtain an order for sale from the court and thereafter the procedure for sale of the charged property is determined by court (judicial sale) (see s 257 of the National Land Code).

[24] It is the court that determines the reserve price the charged property is to be sold ie at a price equivalent to the estimated market value of the property. This is provided in s 257(d) of the National Land Code which we now set out as follows:

> 257 Matters to be dealt with by order for sale. (1) Every order for sale made by the Court under section 256 be in Form 16H and shall:
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> ...
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> (d) required the Registrar of the Court to fix a reserve price for the purpose of the sale, being a price equal to the estimated market value of the land or lease in question;

[25] The conduct of the sale itself is also within the purview of the High Court and not the bank.

[26] In our view, the bank cannot be said to have ignored the settlement agreement as this was a judicial sale conducted by the court in accordance with the provisions of the National Land Code and the fact the sale was proceeded with on the 7 September 2010 was a matter within the purview of the court.

[27] On the second point being canvassed in this appeal as the National Land Code ie s 257(d) provides a statutory formula to calculate the reserve price for the sale of the charged property, the bank could not by any stretch of the imagination be said to have breached its duty of care and good faith to the chargor. The best possible price was obtained and the chargor at the material time did not appeal against the determination of the reserve price. Whilst the settlement agreement might have aided Talam in its settlement of debts with the State Government of Selangor, it would not directly benefit the chargor. As the bank had complied with the relevant provisions of the National Land Code, it is our view, a plea of breach of duty of care and good faith in not obtaining the best possible price cannot be sustained against the bank.

[28] Talam's counsel argues a plea of an equity of redemption arising in

favour of the Talam. This is because the bank was aware of the settlement agreement and its terms one of which was the purchase of the charged property by Talam which would not only redeem the bank but leave a surplus for Talam to settle its debts with the state government. The bank had breached its duty of care in ignoring the terms of the settlement agreement in allowing the said charged property to be sold by public auction.

[29] To our mind, the conduct of the judicial sale was in the hands of the court as provided by the provisions of the National Land Code. Even if the bank had written to vacate the public auction, the auction could still have been proceeded with by court. It is our view that no duty of care could be imposed on the bank as the judicial sale was conducted by the court and not the bank as the rights that were being proceeded with were rights *in rem.*

[30] In the Federal Court case of *Low Lee Lian v Ban Hin Lee Bank Bhd* [1997] 1 MLJ 77 the decision of Gopal Sri Ram JCA (as His Lordship then was) and we quote:

> Thus, in the absence of any special circumstances, a chargee who has obtained an order for sale is not barred by res judicata or any other form of estoppel from pursuing actions in personam against the charger or the surety. The test of mutuality or reciprocity is, accordingly, not met. Consequently, no legitimate ground may be advanced to bar the charger from mounting an action in personam against the charge, eg for breach of contract or for failure to furnish proper accounts.

There are small reservoir of *rights in personam* reserved to the chargor arising out of the contract contained in the annexure to the charge for instance bad faith, unconscionable conduct of the bank etc. Those rights are reserved for the chargor only and not Talam and in this case, we find as far as Continental Heights is concerned, the charged property has been redeemed, and the surplus sale price would be refunded to the chargor.

[31] The learned judge in her grounds of judgment dealt with the question of equity of redemption being canvassed by Talam. Although lacking succinct forcedness, the principle has been considered by the learned judicial commissioner in her judgment. To our mind, the doctrine of equity of redemption has no place in a Torrens System Land Code covered by registration. In our National Land Code, the quintessence of the relationship between the chargor and the bank was registration of a charge on the charged property whilst the chargor remains the registered owner of the charged property. Unlike an english mortgage where the legal estate vested in the mortgagee, under our code, the right of the chargor to redeem the charged property is preserved and to import this doctrine into our code is untenable and even if this could be stretched elastically it could not afford a right to Talam who was not the chargor but a company linked to Continental Heights at the very least. The distinction between a mortgage and charge has been very well

elucidated in the Federal Court decision of *Phileoallied Bank (M) Bhd v Bupinder Singh a/l Avatar Singh & Anor* [2002] 2 MLJ 513; [2002] 2 CLJ 621 where in the holding of FCJ Abdul Malek Ahmad and we quote:

> (1) The procedural provisions of O 83 of the RHC which apply in respect of charge actions do not apply to mortgages. The LACA in the present case amounted to an equitable mortgage and not an equitable charge. At common law, a legal or an equitable mortgagee has, upon the mortgagor's default in repayment, the power to sell and convey the legal estate to a third party pursuant to the express terms of the mortgage deed without an order of the court (pp 633 f–g, 635 b–i, 636 a–c, 638 a–d & 640 e–f).
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> (2) The function of procedural provisions like O 83 of the RHC is to provide the machinery, the manner or means, by recourse to which legal rights and duties may be enforced or recognised by a court of law seized with jurisdiction to adjudicate on a dispute before it. The rules of court and of practice and procedure regulate the machinery of litigation; they do not intrude onto the province of substantive law. Consequently, O 83 of the RHC (as well as the inherent jurisdiction or powers of the court) could not be relied upon to compel the bank, an equitable mortgagee, to make an application to the court for an order for sale in the absence of any substantive provision or rule, express or implied, in the National Land Code or at common law imposing exactly such an obligation. The court should, therefore, recognise and give effect to the contractual rights and obligations as had been determined between the borrowers and the bank (pp 632 h–i, 633 a–b, 638 e–h, 639 d–e, 640 i & 641 a).
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> (3) *Although for most practical purposes a charge should be regarded as a species of mortgage, there is one essential difference. A mortgage is a conveyance of property, legal or equitable, subject to a right of redemption. A charge conveys nothing; it merely gives the chargee certain rights over the property as security for the loan. At common law, only mortgages can be created; in equity both mortgages and charges are possible. The remedies of an equitable chargee are inferior to those of a mortgagee (p 639 f–i).*

[32] We are of the view that this position is well explained in the Supreme Court decision of *Malayan United Finance Bhd v Tay Lay Soon* [1991] 1 MLJ 504 where the court held as follows:

> (2) The respondent's proposition that he has a statutory or equitable right of discharge or redemption of a charge under the provisions of the National Land Code must be rejected. It is the chargor or the borrower who has the right to discharge the charge and the right to tender payment before the judicial sale is specifically and exclusively granted to the chargor. Since the right or interests in the charged land remains with the registered owner he has nothing to redeem. To speak of the equity of redemption or the like of it in the situation under the National Land Code is clearly technically and legally incorrect.

We therefore are unable to accept this argument of the appellants.

[33] Counsel for the appellants very meticulously we might add, took us through a string of cases arising out of the principle of law stated by Salmon LJ

in *Cuckmere Brick Co Ltd v Mutual Finance Ltd* [1971] Ch 949 as follows:

> I accordingly conclude, both on principle and authority, that a mortgagee in exercising his power of sale does owe a duty to take reasonable precautions to obtain the true market value of the mortgaged property at the date he decide to sell it.

[34] The Privy Council in *Tse Kwong Lam v Wong Chit Sen* [1983] 1 WLR 1349 at p 1355 adopted the same approach and the same approach has been adopted in Malaysia and Singapore.

[35] Counsel for the appellants cited the decision of Singapore Court of Appeal in *How Seen Ghee v Development Bank of Singapore Ltd* [1994] 1 SLR 526 (Tab 5 of the appellants' bundle of authorities), wherein the Singapore Court of Appeal held:

> (1) In exercising his power of sale, a mortgagee has a duty to take reasonable care to obtain whatever the market value of the property at the time he chooses to sell the property. He is entitled to prefer his own interest to that of the mortgagor provided that he does not disregard the interests of the mortgagor. However, if his own interests are not at risk, he is not entitled to act in a manner which sacrifices the interests of the mortgagor.

[36] This Singapore Court of Appeal's decision followed the principles in *Cuckmere Brick Co Ltd v Mutual Finance Ltd* [1971] Ch 949. The reasoning of the court can be found in its *per incuriam* comments and we quote:

> When the power of sale has arisen, and when it comes to realising the security, there is seldom any divergence of interests between the mortgagee and the mortgagor; both are interested in securing the best price from the sale of the security. An auction is not always the best way of securing a good price; it is often possible for the mortgagor himself, who has every reason to try to do so, to secure a good price by a private treaty sale. There is seldom any harm in affording him a reasonable opportunity to do so. While the mortgagor is engaged in such efforts, the mortgagee should refrain from doing anything which is liable adversely to affect the mortgagor's efforts.

[37] Here lies the distinguishing factor in our case. The judicial sale lies in the hands of the officer appointed under the act to conduct the sale and the conduct of the judicial sale, vests in the officer's hands and not the bank. In fact as we have set out earlier a situation could arise where even if the bank attempts to adjourn a particular auction, the judicial officer in charge of the sale proceedings could still proceed. On the facts of this case, the bank had earlier acceded to an adjournment of the auction when it was fixed on 8 April 2010 and thereafter the auction was fixed on 7 September 2010 when the auction actually took place the redemptions period had expired. We further are of the view; the principles in *Cuckmere* as enunciated in this Court of Appeal's decision apply only (if at all) to the chargor and not Talam. If there is any duty

of care to be imputed (if at all) then surely it follows that it is owed to the chargor and since the auction sale has attracted a surplus of RM9m to the chargor we cannot see how there has been any breach of duty on the part of the bank. More importantly, acting within the bounds of the National Land Code will surely preclude the bank owing any independent duty of care to the chargor within the context of *Cuckmere*'s principles.

[38] The chargee in our case had availed itself of statutory procedure provided for under the National Land Code to obtain a reserve price for the sale of the charge property and that entitled the chargor to a surplus. Talam is not the chargor. As far as the bank is concerned, it obtained a estimated market value for the charged property which is what they are statutorily required to do. To our mind the common law principle of duty of care enunciated in these cases must be read in the context of a judicial sale not a sale determined by the bank. The conduct of the bank must be measured by the statutory requirements of the bank. As we have said earlier, the chargor retains residual *rights in personam* but we are of the view that the 'Cuckmere' principles have no bearing in this case and these residual rights are vested in the chargor, not Talam. We wish to refer to the case of *Pendlebury v The Colonial Mutual Life Assurance Society Limited* [1912] 13 CLR 676 a judgment of the High Court of Australia and to the judgment of Isaacs J and we quote:

> A mortgagee of land is always in equity and under the Transfer of Land Act 1890 sec 114, at law also, merely the holder of a security. The power of sale is given to him entirely for his own benefit, and its purpose is to enable him to realise enough to satisfy his claim, if the property will produce it, and to return whatever balance may remain to the mortgagor. *It is undoubted law that so long as he observes specified formalities and acts in good faith his conduct cannot be challenged. But what is included in 'good faith'? Lindlev LJ in Kennedy v De Trafford (1) said: 'It is not right, or proper, or legal, for him, either fraudulently, or wilfully, or recklessly, to sacrifice the property of the mortgagor'. Lord Herschell in the House of Lords (2) said that was all included in good faith. In the same case Lord Macnagthen (3) said: 'If a mortgagee selling under a power of sale in his mortgage takes pains to comply with the provisions of that power and acts in good faith, I do not think his conduct in regard to the sale can be impeached'.*
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> There are some words of Lord Herschell which to some extent leave undetermined the question how far the mortgagee is bound to take reasonable precautions in the exercise of his power of sale, but the inclination of his mind seems to be against it.
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> Regarding the matter from standpoint of principle it seems to me clear that the word 'recklessly' cannot include mere negligence or carelessness in carrying out the sale.
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> If the right to sell is a power which, as laid down in *Warner v Jacob* (4) is given to him not as trustee for the mortgagor but for his own benefit, it must carry with it the consequence that with respect to the way he carries out the sale, not merely is he not liable as for breach of trust, but also that he owes no duty of care to the mortgagor, so long as he is bona fide acting within the limits of his power. His rights under the power are adverse to the mortgagor. He cannot therefore, on any principle known

to the law be liable for mere negligence, because that assumes a standard of care owed to another. The mortgagee is however confined by the expressed and implied limits of his power and by nothing else. Lord Lindley said in *Free Church of Scotland (General Assembly of) v Overtown (Lord)* (5): 'There is a condition implied in this as well as in other instruments which create powers, namely, that the powers shall be used bona fide for the purpose for which they are conferred'. And in a later case, *British Equitable Assurance Co Ltd v Baily* (6), the same learned Lord observed regarding the power of a company to alter its by laws: 'Of course, the powers of altering bylaws, like other powers, must be exercised bona fide, and having regard to the purposes for which they are created, and the rights of persons affected by them'.

[39] We agree that pursuant to the related provisions of the National Land Code, after a public auction and the payment of the proceeds of sale, the sum of RM9m should have been refunded to Continental Heights and we have no hesitation to invoke our powers under s 69(4) and (5) of the Courts of Judicature Act 1964 to direct that the aforesaid sum be so refunded (see the Federal Court case of *Dato' Tan Chin Woh v Dato' Yalumallai @ M Ramalingam s/o V Muthusamy* [2016] 5 MLJ 590.

[40] On the upshot we order:

(a) the appeal is dismissed with costs; fixed at RM20,000 to be paid by the appellant to the respondent subject to payment of allocator, and the deposit is to be refunded;

(b) pursuant to s 69(4) and (5) of the Court of Judicature Act 1964 the sum of RM8,240,754.52m is to be refunded by the bank to Continental Heights forthwith; and

(c) interest at 8%pa from 30 December 2010 till the date of amendment and thereafter at 5%pa till date of realisation.

Appeal dismissed with costs.

Reported by Afiq Mohamad